APPEAL NO. 040081
FILED MARCH 4, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on April 17, 2003. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on January 16, 1998, with a 5% impairment rating (IR) as certified by the designated doctor appointed by the Texas Workers' Compensation Commission. In Texas Workers' Compensation Commission Appeal No. 031205, decided July 3, 2003, we reversed and remanded the hearing officer's MMI/IR determination for the claimant to be reexamined by the designated doctor. On remand, the hearing officer determined that the claimant reached statutory MMI on March 15, 1999, with a 32% IR, as certified in the designated doctor's amended report. The appellant (self-insured) appeals, asserting that the hearing officer erred by failing to add the issue of extent of injury and that the designated doctor's IR certification is contrary to the great weight of the other medical evidence because it does not rate the claimant's condition as of the date of MMI as required by Advisory 2003-10, dated July 22, 2003. The claimant urges affirmance. The hearing officer's MMI determination was not appealed and has become final. Section 410.169.

DECISION

Affirmed.

EXTENT OF INJURY

As stated above, the self-insured asserts that the hearing officer erred by not adding the issue of extent of injury with regard to the condition of charcot arthropathy. The self-insured's assertion is without merit. Our review of the record reveals that the hearing officer considered the issue and found that the medical evidence "was persuasive in proving that the [c]laimant's compensable injury included [c]harcot arthropathy." In view of the evidence presented, we cannot conclude that such determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

IMPAIRMENT RATING

The hearing officer did not err in determining that the claimant has a 32% IR. The self-insured contends that the designated doctor's IR certification is contrary to the great weight of the other medical evidence because it does not rate the claimant's condition as of the date of MMI as required by Advisory 2003-10. The self-insured cites the portion of the Advisory which states, "[i]n the Texas workers' compensation system, the injured employee's [IR] is based on the employee's condition on the date of [MMI] or the date of statutory [MMI], whichever is earlier." The Appeals Panel rejected this argument in Texas Workers' Compensation Commission Appeal No. 033128-s, decided

January 28, 2004. Under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)), the designated doctor's response to a request for clarification is entitled to presumptive weight as it is part of the designated doctor's opinion. *See also*, Texas Workers' Compensation Commission Appeal No. 013042-s, decided January 17, 2002. The hearing officer considered the evidence, in this case, and found that the designated doctor's amended report was not contrary to the great weight of other medical evidence. The hearing officer's determination is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

The hearing officer's decision and order is affirmed.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

EXECUTIVE DIRECTOR
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Edward Vilano
Appeals Judge

CONCURRING OPINION:

I concur in the affirmance of the hearing officer's decision on remand awarding the claimant a 32% IR. I am filing this concurring opinion to point out a few matters.

First, I filed a dissent in Texas Workers' Compensation Commission Appeal No. 033128-s, decided January 28, 2004. I would have affirmed the hearing officer's decision in that case because the 5% IR found by the hearing officer was based on the designated doctor's evaluation of the claimant on the date of MMI, and the language in Advisory 2003-10 regarding basing the IR on the employee's condition on the date of MMI or the date of statutory MMI, whichever is earlier, is consistent with what the Texas Supreme Court stated about the IR being determined at MMI in Texas Workers' Compensation Commission v. Garcia, 893 S.W.2d 504, 525 (Tex. 1995).

Second, the self-insured in the instant case apparently wants the Appeals Panel to adopt the 5% IR that was certified by the designated doctor on June 15, 1998. While MMI does not appear to be an appealed issue, the hearing officer's determination that the claimant did not reach MMI until March 15, 1999, the statutory date of MMI (the expiration of 104 weeks from the date on which income benefits began to accrue (Section 401.011(30)(B)), is amply supported by the evidence. Section 401.011(23)

provides that "impairment" means any anatomic or functional abnormality or loss existing after MMI that results from a compensable injury and is reasonably presumed to be permanent. Consequently, adoption of the 5% IR assigned by the designated doctor based on his evaluation of the claimant nine months before the claimant reached MMI is not a viable option.

Third, Appeals Panel No. 399 reversed and remanded this case to the hearing officer in Appeal No. 031205, *supra*, decided July 3, 2003. Section 410.203(c) provides that an Appeals Panel may not remand a case more than once. Thus, remand is not an option. Since the claimant reached statutory MMI on March 15, 1999, and has been evaluated twice by the designated doctor, the second time at the direction of the Appeals Panel, I see no useful purpose in rendering a decision against the claimant for the claimant to be evaluated by another designated doctor when that evaluation would occur five years after the MMI date.

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Robert W. Potts
Appeals Judge

DISSENTING OPINION:

I agreed with the dissent in Appeal No. 033128-s, *supra*, and I agree that there is no easy answer to the facts in this case. I also believe that the designated doctor's original 5% IR, prior to the statutory MMI date, cannot be used. Consequently, I would have reversed the hearing officer's decision and rendered a new decision that under the unique circumstances of this case no IR can be determined and that the designated doctor should assess an IR as of the date of statutory MMI, however difficult that may be.

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Thomas A. Knapp
Appeals Judge